No. 6 AND 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 6

CHARLES F. BRANNAN, Secretary of Agriculture of the United States, *Petitioner*,

v.

DELBERT O. STARK, A. F. STRATTON, A. R. DENTON, G. STEBBINS, and F. WALSH, *Respondents*.

No. 7

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC., *Petitioner*,

v.

DELBERT O. STARK, A. F. STRATTON, A. R. DENTON, G. STEBBINS, and F. WALSH, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

REPLY BRIEF FOR THE DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC.

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REPLY BRIEF FOR THE DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC.

This brief of the petitioner in No. 7, the Dairymen's League Co-operative Association, Inc., is in reply to the respondents' brief.

I. Reply to Respondents' Argument with Respect to Substantial Evidence.

The Respondents' brief concedes (p. 13) that the issues in the case relate to statutory authority for the challenged provisions in the Order, and there is present no question as to whether substantial evidence supports the Secretary's findings. Moreover, the complaint (R. 1-7) fails to present an issue as to whether substantial evidence on the record as a whole supports the Secretary's findings, and also the record before the Court does not include the extensive hearing record on which the Secretary based his findings and issued the present provisions in the Order for cooperative payments. Nevertheless at various places throughout Respondents' brief factual issues are injected in the arguments with respect to the statutory authority for the provisions in the Order.

It is asserted in the Respondents' brief (p. 27) that as a matter of fact the "calendar month, however, is clearly not a representative period" for the purpose of determining whether cooperative payments may be regarded as a further adjustment under § 8c(5)(B) of the Act "equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and association of producers on the basis of their marketing of milk during a representative period of time."

It is argued in Respondents' brief (p. 37) that as a matter of fact there "is certainly nothing 'incidental' about the economic impact of this deduction." And Respondents' brief reviews (p. 46) the evidence in the 1941 hearing as to whether cooperative payments constitute, as a matter of fact, an inappropriate element in the formula for fixing the Class II price.

Respondents' brief argues (pp. 12 and 57) that from an evidentiary standpoint, there is no warrant for the view that cooperatives incur losses in handling surplus milk. Then Respondents' brief asserts (p. 58) that as a matter of fact manufacturing surplus milk by the cooperatives "is

thoroughly profitable." In contending that the provisions in the order for cooperative payments are not "necessary," the Respondents' argument is based on the contention that under all the relevant facts and circumstances there is no factual basis for concluding that the payments to cooperatives for market services are necessary in order to have an effective program.

All of these arguments by the Respondent are irrelevant in this case. The respondents failed to present the issues, from an evidentiary standpoint, in their complaint; and the record before the Court does not contain the hearing record on the basis of which the present provisions of the Order were made effective. In the absence of the evidence on which the findings and the provisions in the Order are based, the Courts assume the existence of sufficient evidence to support the action by the Secretary. *Niagara Hudson Corp.* v. *Leventritt*, 340 U. S. 336, 340; *Interstate Commerce Commission* v. *Louisville and Nashville R. R. Co.*, 227 U. S. 88; *United States* v. *Northern Pacific Ry. Co.*, 288 U. S. 490. The findings of the Secretary on the basis of the evidence at a public hearing carry a presumption of the existence of a state of facts justifying the action. *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 567-568; *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 184-187.

II. Reply to Respondents' Argument that Cooperative Payments Are Not Compensation for Marketwide Services Furnished by the Cooperatives for the Benefit Of all Producers.

Respondents in their brief urge that the services qualifying cooperatives for payments are not marketwide services "contributing to the solution of the seasonal surplus problem" (pp. 8, 15), that the payments are for services by the cooperatives to their own members (p. 9), that the payments are a "bounty" for what in fact are "thoroughly profitable" operations (pp. 12, 20, 57-8), and are diversions "into the coffers of private associations" (pp. 43-44).

The general, marketwide services furnished by cooperatives are of two kinds—one, marketing control services, which include contributing to the solution of the seasonal surplus problem; and, second, research services and the use of such data from time to time in connection with amendatory action. Respondents carefully ignore the research services, also the provisions of section 904.10 of the Order providing for these marketwide services. The content of each of these two categories of general, marketwide services is described in petitioners' brief on pages 34-36. Paragraph (2), § 904.10(a) of the Boston Milk Order, is the keystone to the marketing control services. That paragraph requires that a cooperative qualifying for payments shall operate as a responsible producer-controlled marketing association exercising full authority in the sale of the milk of its members. Paragraph (7) reenforces this with the requirement of collaboration in the operation of the plan of uniform pricing of milk to handlers. Paragraph (5) of § 904.10(a) of the Boston Milk Order is the keystone to the research services. That paragraph requires that a cooperative qualifying for payment shall maintain a competent staff for dealing with marketing problems.

Respondents also appear to ignore the fact that there are two types of cooperative payments under the Order (§ 904.10(b)): the 1¢ payment to bargaining cooperative without plants, and the 2¢ payment to operating cooperatives with plants. Implicit in this distinction is the requirement of surplus operations to be performed by the operating cooperatives.

Although claiming that the question is merely one of statutory authority, respondents are in effect contesting the finding made in 1944 (set forth Petitioners Br. Appendix, pp. 11-12) as to the two types of cooperative activities or services covered by the cooperative payments. Those findings state that such services are presentation of evidence at hearings on prices for milk and differentials to reflect handling costs in order to furnish an adequate basis for

constructive amendments to the Order; and the assumption of responsibility for a reserve of milk to meet their irregular needs of distributors which is essential in a market which provides marketwide equalization. Not only are such services required by the order but cooperative payments are suspended on failure to furnish such services. Thus, for example, five New York cooperatives had their payments suspended because they permitted their members' milk to be devoted to a low price utilization, namely, manufacture of cheese, at a time when a market existed for a higher priced utilization, namely, fluid milk and storage cream. This action had caused an unwarranted decline in the uniform price to producers. Similarly, another New York cooperative was suspended for failure to exercise full authority in the sale of its members' milk. (See, the Market Administrator's Bulletin, New York Metropolitan Milk Marketing Area, Vol. 11, No. 7, July 1951, pp. 1, 3).

Proprietary handlers are not required by any provision of the Boston Milk Order to furnish fluid milk to the market in times of short supply. They can continue to make butter or cheese or evaporated milk all through the year if it is to their financial interest to do so and still get contributions from the pool. Cooperatives, however, are required to supply the market during the short period, to exercise the control over their milk required by § 904.10(a)(2) and (7) of the Order, and to provide the "sufficient quantity of pure and wholesome milk" contemplated by § 8c(18) of the Act.

In consequence, cooperatives are required to have expensive standby facilities sufficient to take care of and manufacture the surplus of milk for only 3 or 4 summer months. On the other hand, during the short supply period the cooperatives' milk is required to be utilized to supply handlers lacking adequate fluid milk supplies and cannot be used for running the cooperatives' manufacturing plants.

It is these irregular stand-by operations that respondents call profitable business operations and that they say coop-

eratives could abandon if the operations prove unprofitable (Respondents Br. 20). The operations are not profitable (R. 234-9, 183-4, 68-73), and respondents, themselves, in their brief (pp. 46-47) quote approvingly testimony as to the "extraordinary high costs of operating cooperatives for servicing the market." As pointed out above, the cooperative payments are suspended if the cooperative fails to perform these services. Finally, the policy of the Act to establish orderly marketing and parity prices cannot be achieved unless the cooperatives do perform these services.

Further, a cooperative is not a "private" association in the disparaging sense of concealment of its affairs. The Order itself requires reports to the market administrator from the cooperative "with respect to its use of cooperative payments and its performance in meeting the requirements set forth as the basis for such payments . . .", and provides for suspension for misuse of such payments (§ 904.10(c) and (d)).

III. Reply to Respondents' Argument That the Payments To Cooperatives are Inconsistent With the Requirements of Section 8c(5)(A) of the Act for Payments of Uniform Class Prices.

The argument in the respondents' brief (pp. 45-47) that cooperative payments are invalid "adjustments" in the Class II price, under § 8c(5)(A) of the Act, relates to the provisions of § 904.4(b) of the amendments to the Order in 1941 (7 C.F.R., 1941 Supp., 904.4(b)). But the amended Order plainly provides that the Class II price must be paid by all handlers, and there is no provision for a variation or adjustment in the Class II price to cooperatives or on account of cooperative payments. To be sure, in fixing the Class II price by means of the complex formula[1] in

[1] The Class II price under §904.4(b) of the 1941 amendments to the Order is computed as follows:

(1) In the case of such milk delivered to a handler's plant located not more than 40 miles from the State House in Boston, the

§ 904.4(b) of the amendments in 1941, consideration was given to the effects that were expected to flow from the payments to cooperatives for market services, but there were many factors that were relevant in arriving at a proper Class II price to be paid by all handlers. There can be no doubt that in determining the proper price level under the Order consideration must be given to the outlets, if any, for surplus milk, and its utilization by the cooperatives that perform market-wide services.

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price [shall be] calculated pursuant to subparagraph (2) of this paragraph, plus 17 cents.

(2) Except as provided in subparagraph (3) of this paragraph, in the case of milk delivered to a handler's plant located more than 40 miles from the State House in Boston, a price which the market administrator shall calculate as follows: divide by 33.48 the weighted average price per 40-quart can of 40 percent bottling quality cream in the Boston market, as reported by the United States Department of Agriculture for the delivery period during which such milk is delivered, or the last such price reported for a delivery period if no such price is reported for the delivery period during which such milk is delivered, multiply the result by 3.7 and subtract 29 cents: *Provided,* That any plus amount for skim value be added which results from the average of the two following computations: (a) compute the average of all hot-roller process dry skim milk quotations, "other brands, human consumption, barrels, car lots," and for "other brands, animal feed, car lots, bags or barrels" (using midpoint of any range as one quotation), published during such delivery period in The Producers' Price-Current, subtract 4-¼ cents, multiply by 7; and (b) compute the average of all quotations (using midpoint of any range as one quotation), published during the delivery period in the Oil, Paint, and Drug Reporter, for domestic 20-30 mesh casein in bags in car lots at New York, subtract 6.6 cents and multiply by 2.2: *Provided, further,* That if either computation results in a minus amount, the other shall be used in lieu of the average.

(3) During the May, June and September delivery periods, in the case of such milk, other than route returns, made into butter at a handler's own plant more than 40 miles from the State House in Boston, the minimum price shall be computed by the market administrator, instead of the price otherwise applicable pursuant to this paragraph, as follows: from the average of the highest prices reported daily during such delivery period by the United States Department of Agriculture for 92-score butter at wholesale in the New York market, deduct 5 cents, add 16-⅔ percent and multiply by 3.7: *Provided,* That any plus amount shall be added which results from the skim value as computed in subparagraph (2) of this paragraph, less 15 cents.

The quotation in the respondents' brief, page 47, in an attempt to support their argument, fails to set forth the entire statement in the record, *viz.*, the payments to cooperatives are compensation "for the extraordinary high costs of operating cooperatives *for servicing the market,*" and such payments are "fair" [Emphasis supplied] (R. 74). The payments to the cooperatives are for market services, and not for milk. Hence there can be no basis for the respondents' argument that a cooperative payment is a variation or adjustment in the payment of the Class II price for milk.

An analysis of the provisions in the formula for Class II milk also refutes the respondents' argument. A part of the formula set forth in the amendments in 1941 provides for the subtraction of 29 cents, and this sum includes *inter alia* 21½ cents for station handling allowances and 5½ cents for cream freight. See, *Pricing Class II Milk in the Boston Market* (a report by the Boston Class II Price Committee, February 1951), p. 17. In arriving at a determination as to the proper level for the Class II price, various factors were relevant, and the record shows that the formula as amended in 1941 was substantially favorable to *all* producers (R. 74). The reduction of the handling allowances to be subtracted in the method of computing the Class II price results in a price level for Class II milk that is higher than the level that would have prevailed prior to the amendment. The respondents, as dairy farmers, are thereby inescapably benefited by the amendments complained of in the respondents' brief. But the large proprietary handlers are required under the amendments to pay a higher Class II price, and since the handlers are primarily carrying on this litigation in disguise, the respondents, as dairy farmers, are advancing a vicarious complaint on behalf of the large proprietary handlers. Presumably the large proprietary handlers believe that the elimination of the provisions for cooperative payments may result in further amendments whereby the handling allowances on Class II milk will be increased, in the Class II price formula, with a

resulting benefit to the handlers and a detriment to the producers in the market.

The cooperative payments are received in some instances by operating cooperatives that are handlers, although the bargaining cooperatives that receive the lower rate of payments under the order are not handlers. But any payment to a cooperative that is also a handler is for marketwide services, and certainly is not a variation or adjustment in the Class II price for milk. The respondents' argument really goes to whether substantial evidence supports the method or formula used to determine the level of the Class II price, but the complaint fails to raise an issue as to that (R. 1-7), and the hearing record of the 1947 amendments on which the present order is in effect, is not before the Court.

There can be no doubt that the market services by the cooperatives have a direct relationship to the classification, pricing, and pooling of milk; and in determining the proper class price under the order, consideration must be given to the outlets for surplus milk that are provided by the cooperatives that receive the payments. But that relationship between cooperative payments and the Class II price is certainly not by way of a variation or adjustment in the payment of the Class II price by the handlers. The Class II price is paid by all handlers without any variation or adjustment on account of cooperative payments from the producer settlement fund.

IV. Reply to Respondents' Argument That the Uniform Blended Price Must Pay Out the Exact Value of All the Milk Computed at the Class Prices.

The argument in respondents' brief (pp. 40-45) that a milk order is required to provide for a uniform blended price under § 8c(5)(B) of the Act that will result in paying to producers the exact value of all their delivered milk computed at the class prices under § 8c(5)(A), would destroy some of the orders now in effect. The Louisville

Milk Order with its provisions for seasonality payments (see below, pp. 12-13) is one example of a deduction from the producer settlement fund that prevents any such equality between the aggregate of the minimum prices and the aggregate of the blended prices. Other such deductions are set forth in pages 53 and 54 of petitioner's main brief.

On the other hand, the blended price may, on occasion, pay out more than the exact value of milk computed at class prices. An example is the New York Order. The New York Order (7 C.F.R., 1949 ed., 927.1 *et seq.*) has since 1945 provided for the uniform blended price to be paid only to the producers of the milk in "pool plants," even though milk from non-pool plants may be marketed under health department approval in the marketing area. Equalization payments are required to be made, under certain circumstances, on the non-pooled milk. See, § 927.9(h) of the New York Order. The payments prevent the dumping of milk from non-pool plants on the market at a cost below that of the pooled milk. The payments are required to go into the producer settlement fund, and are included in the computation of the uniform blended price. Hence the uniform blended price to producers may, in view of the equalization payments, pay to producers *more* than the exact value of the pooled milk computed at class prices.

Various other milk orders also require additional payments under certain circumstances with respect to "outside milk" and such additional payments are included in the computation of the uniform blended price under § 8c(5)(B) of the Act. See, *e.g.*, the Chicago Order (7 C.F.R., 1949 ed., 941.6(b)), the Lima Order (7 C.F.R., 1950 Supp., § 995.11(a)) and the Topeka Order (7 C.F.R., 1949 ed., 980.6(b)). Also the payments of interest on delinquent obligations under the various milk orders are additions to the pool in the computation of the uniform price under § 8c(5)(B) of the Act, and such payments result in a uniform price that pays to producers more than the exact value of their milk as computed at class prices.

In our case the handlers are complaining (through respondent producers) because the blended price will pay out to the producers in the pool *less* than the aggregate of the value of the milk at the class prices. Under the New York Order handlers are complaining because the blended price pays out to producers in the pool *more* than the aggregate of the value of their milk at the class prices and have instituted court proceeding. See, *Charles Kass, Individually and Trading as Babylon Milk and Cream Co.* v. *Brannan*, No. 48, Oct. Term, 1951, now pending in the United States Court of Appeals for the Second Circuit.[1]

The latitude allowed under § 8c(5)(B) of the Act, for fixing the uniform price, is such that the resulting price may, in view of additions or subtractions, pay to producers more or less than the exact value of their milk computed at class prices under § 8c(5)(A). There is no requirement in the Act for the conclusion contended for by respondents.

V. Reply to Respondents' Argument That Cooperative Payments Give Cooperative Producers a Greater Price For Their Milk.

Respondents in their brief (pp. 48,6) state that the cooperative payments are payments to producers who are members of cooperative associations and enable such producers to receive a proportionately greater share of the total value of the milk in the pool than is received by nonmember producers. Section 904.10(b) of the Boston Milk Order specifically provides for payments to cooperative associations, not to the individual members. Further, the payments are for services, not milk. There is no evidence of record that a single cent of the cooperative payments is distributed by a cooperative to its producer members. On the contrary, the payments are only partial compensation for the general, marketwide services furnished by the cooperative.

[1] The court below, the United States District Court for the Eastern District of New York, held valid without opinion the Order provisions for these payments to the producer settlement fund.

Respondents stress the amount of these payments, stating that on the average they aggregate $250,000 a year under the Order for all the numerous qualified cooperatives. On the basis of the data set forth in Government Exhibit No. 11 (R. 250) approximately 68.6% of the deliveries of milk are made by members of cooperatives and thus approximately 68.6%, or $171,500, of the $250,000 deduction is borne by such cooperative members. Deductions from the producer settlement fund affect all producers pro rata on the basis of their deliveries of milk and not merely the non-cooperative producers.

VI. Reply to Respondents' Argument That the Equitable Apportionment Clause Does not Authorize Cooperative Payment Provisions in an Order.

Respondents take the position in their brief (pp. 9 and 26-27) that the equitable apportionment clause (§ 8c(5)(B)(d)) of the Act is limited to permitting order provisions for a base rating plan. Later, however, respondents feel called upon to explain the basis for the Secretary's authority for the seasonal deduction provisions in the Louisville Milk Order (7 C.F.R., 1949 ed., § 946.7-(b)(3)). Under that Order formerly 40¢/cwt., and presently 8% of the average basic price for the prior calendar year, is deducted during the months of April, May and June and thus becomes available for distribution to producers during subsequent months. However, the producers in the spring months who bear the deductions are not necessarily the same producers as those during the summer or fall months who recover the deductions, nor will their marketings necessarily be in the same proportion. Actually many producers who make spring deliveries step out of the fluid milk market and make no deliveries thereafter. This seasonality deduction from the producer settlement fund is borne by the surplus supply season producers for the benefit of the short supply season producers. Respondents inconsistently find that the deduction is permitted by the equitable apportionment clause (Re-

spondents Br. pp. 67-8). Obviously the equitable apportionment clause is not, even in respondents' view, limited to the base surplus plan. That clause includes authority for other order provisions including those that will equitably apportion the value that accrues to milk by virtue of the general, marketwide services furnished the cooperatives.

VII. Reply to Respondents' Argument That the Cooperative Clause Grants the Secretary no Power in Addition To Section 8c(5).

Respondents in their brief (pp. 29-30) state that the cooperative clause (§ 10(b)(1)) of the Act is "not intended to enable the Secretary to override for the benefit of cooperatives the express limitations imposed by § 8c(5)". By this respondents mean that the cooperative clause is not to be read *in pari materia* with § 8c(5) and does not grant authority for including cooperative payment provisions in an order. In support of this position respondents cite certain testimony of the Agricultural Adjustment Administrator in Congressional hearings at the time of the 1935 Act to the effect that § 10(b)(1) would "neither extend nor limit the authority of the Secretary."

Whatever may be the proper construction of this statement by the Administrator, respondents failed to quote his further statement before the Senate Committee on Forestry and Agriculture (Hearings on S. 1807, 75th Cong., 1st Sess., pp. 45-6) in which he stated that, while it was not the intention of the bill to discriminate in favor of cooperatives, at the same time discrimination might be necessary in the case of milk orders. Specifically the Administrator said "I can conceive of that [i.e., discrimination] in the case of milk. I would not like to have our power questioned." [Bracketed words added.]

In consequence, the Senate struck out a House provision prohibiting discrimination against other producers, processors, and handlers and the House accepted the Senate

action in conference (H. Rept. 1757, 74th Cong., 1st Sess., p. 28). Further, both the House and the Senate Committees, in referring to the proposed language for § 10(b)(1) stated (H. Rept. 1241, 74th Cong., 1st. sess., p. 13; S. Rept. 1011, 74th Cong., 1st. sess., p. 26)—

> "It is not intended by this language to discriminate against other handlers, processors, or dealers, but it has been found from experience that the participation by local committees and associations of producers has been of material value in administering the program."

VIII. Reply to Respondents' Argument That the Milk Licenses or Milk Orders Issued Prior to 1937 did not Provide for Payments to Cooperative Associations of Producers for Market Services.

Respondents' brief argues (pp. 62-64) that the provisions of the 1933 Twin City license for payments to cooperatives for market services are not of a significant character when considered in view of the reenactment in 1937 of the antecedent legislation for milk licenses and milk orders. Specifically, the respondents' brief asserts (p. 64) that the payments under the Twin City license "differ markedly from the imposition of a flat levy on all non-member producers for the benefit of all cooperative associations."

The unqualified terms of the Twin City license refute the respondents' arguments. The license provided for payments to the Dairy Council, and specifically stated that such payments "shall be deemed part of the price paid to producers." (See § III of the license for the Twin City Sales Area.) That necessarily resulted in a payment to the Dairy Council being an "unrecoverable charge against the producers," as cooperative payments are characterized in *Stark* v. *Wickard*, 321 U. S. 288, 301.. In addition, the Twin City license provided in sections II and III of Exhibit A for flat prices as the "uniform prices" under the license. However, in the payment of such prices to non-members of the cooperative a deduction was made for payment to the

cooperative "as a service charge." The price that the nonmembers of the cooperative would have received was thereby reduced by the amount of the payment to the cooperative association of producers. The license also permitted handlers who purchased all of their milk from producers who were not members of the cooperative to deduct from the flat price, fixed by the license, the expenses which the handlers incurred with respect to the handling of surplus milk or in processing or manufacturing surplus milk into byproducts. The license was in effect from September 2, 1933 to February 16, 1934 but it was replaced by License No. 32 effective on February 16, 1934 and the same regulatory provisions were included in License No. 32 which remained in effect until after the amendatory action of Congress on June 3, 1937 whereby this license and all of its provisions were ratified and confirmed.

This example relied on in the respondents' brief disproves the conclusion urged by the respondents. In addition, various licenses and milk orders issued during the period 1933-37 contained provisions for payments to cooperatives or compulsory deductions from non-cooperative producers milk payments in order to compensate for the performance of market services by the cooperatives. These licenses and orders are set forth in the petitioners' main brief, pages 20-22.

The Congressional amendments in 1935 were to "spell out in more detail and with greater freedom from ambiguity the powers which were provided in the original Act," and it was the avowed purpose of Congress in 1935 to authorize by § 8c(5) the pricing and pooling provisions that had been used in the licenses issued prior to that time (S. Rept. 1011, 74th Cong., 1st sess., p. 9, and H. Rept. 1241, 74th Cong., 1st sess., pp. 7 and 9). Then in 1937 this legislation and the licenses and orders under it were reviewed by Congress in the reenactment of the statutory authority for these programs and the express approval was given by Congress of all prior actions under the Act. There can, therefore, be

no doubt of the significance of these licenses in view of the subsequent action by Congress.

IX. Reply to Respondents' Argument That the Secretary's Authority is to be Narrowly Construed in the Light Of the Schechter Decision.

Respondents, in their brief (pp. 24-25) state that the authority for cooperative payments must be judged against the background and the impact of the decisions of this Court in the *Panama Refining* and *Schechter* cases. Our case presents no question as to the constitutional validity of the authority delegated to the Secretary either with respect to order terms and conditions or with respect to the coverage permissible under the Commerce Clause. From both these standpoints the authority delegated has already been judged constitutionally valid by this Court (*United States* v. *Rock Royal Co-operative*, 307 U. S. 533, 574-577, and *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110.

The *Schechter* case required that delegated power of legislation be canalized within banks to keep it from overflowing and that it not be virtually unfettered. This Court has found that our Act conforms to those requirements. Our question here is solely one of the *extent* of the power validly delegated. Respondents do not contend that the Act as construed by the Secretary would constitute an invalid delegation of legislative power. The *Schechter* case does not require, once power has been validly delegated, that it be narrowly construed. To the contrary it may be construed in the light of the legislative objective and the mechanisms necessary for attaining those objectives. *Phelps-Dodge Corporation* v. *National Labor Relations Board*, 313 U. S. 177, 185-6, 193-5; *American Power and Light Co.* v. *Securities and Exchange Commission*, 329 U. S. 90, 105-6. See also *United States* v. *Dotterweich*, 320 U. S. 277, 280; *Gemsco* v. *Walling*, 324 U. S. 244; *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U. S. 604.

Powers that have been validly delegated to the Secretary

to accomplish the Act's objectives are to be found in the cooperative clause (§10(b)(1)), the equitable apportionment clause (§8c(5)(B)(d)), and the incidental and necessary clause (§8c(7)(D)), as well as the geographical clause (§8c(11)(C)) which requires that the Secretary in issuing orders prescribe such different terms as he finds necessary to recognize differences in various marketing areas. Nothing in the *Panama*, *Refining* and *Schechter* decisions requires these grants of power to be so narrowly construed as to leave the terms of an order for a particular marketing area inadequate to accomplish the policy declared by Congress in the Act.

X. Reply to Respondents' Argument That State v. Dairy Distributors Supports Respondents' Position.

The case of *State* v. *Dairy Distributors*, 217 Wis. 167, 258 N. W. 386, relied on in the respondents' brief (p. 60) relates to issues different in decisive respects from the issues under the Boston Milk Order and the Act authorizing that Order. In the Wisconsin case the milk regulation issued by the State authorities, acting under a statute quite different from the Federal Act, contained no finding as to any necessity for the assessment alleged in that case to be an unlawful exaction. The Court emphasized that "We are in no way enlightened as to what relation this contribution has to the maintenance of the price of milk" and the "Commission nowhere finds that the imposition of such an exaction is necessary." 217 Wis. at 170, 258 N. W. at 388. Moreover, that case involved a criminal proceeding under the Wisconsin statute and the court held that "No finding is made as to the jurisdictional facts which must exist as a condition of exercising the power delegated" under the statute. 217 Wis. at 170, 258 N. W. at 389. That case has no bearing on the issues now presented as to cooperative payments for services found by the Secretary to be necessary under the Boston Milk Order and the Act.

XI. Reply to Respondents' Argument on Class Action, Real Parties in Interest, and Estoppel.

Respondents' argument on these points is confined to the footnote on page 13 of its brief. As to class action, respondent offers no argument in opposition to petitioners' position that the action is not a class action as alleged. Respondents merely refer to the opinions of the courts below. Neither court passed on the point (R. 145-6, 471), nor did this Court in the *Stark* case.

Respondents make no serious attempt to controvert petitioners' argument (Brief, 62-66) that this action is being brought on behalf of the proprietary handlers whom this Court has held have no standing to complain of the cooperative payment provisions and is not brought to adjudicate justiciable interests of respondents; that respondents have not actively participated in the action or exercised any substantial control over it; and that the expenses of the action have all been borne by the handlers.

As to estoppel, respondents rely on the finding of the District Court that all plaintiffs voted against the amended order except one who did not vote (R. 152). The finding is based on a bare statement in the affidavit of the acting Market Administrator Aplin (R. 91). The statement is not in accord with the testimony on deposition of the respondents themselves (R. 257, 292, 317, 353). Under Rule 52(a) of the Rules of Civil Procedure, a finding of fact by a trial court may be reversed where "clearly erroneous." As stated by this Court in *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 395—

> "A finding is 'clearly erroneous' where although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."

The record as a whole supports the definite and firm conviction that the finding by the District Court is erroneous.

Respondents make no attempt to answer other phases of the petitioners' estoppel argument as, for example, that

Stebbins subsequent to the institution of the action joined a cooperative that receives cooperative payments (R. 281-2), that Denton's wife, and not he, was the producer under Order 4 at the time this action was instituted (R. 299-300), and that not Stark, but D. O. and M. J. Stark, were the producers under Order 4 at such time (R. 352, 361-2).

The true situation is brought to light by respondents' complaint in their brief (pages 46 and 47) that the cooperative payments are a "rebate" to one group of handlers (the operating cooperatives), thereby discriminating against another group of handlers (the proprietary handlers). This Court has held that the handlers have no standing to complain as to the distribution of the producer settlement fund since they have no financial interest in that fund (*United States* v. *Rock Royal Co-operative*, 307 U. S. 533, 560-1, 571-2, and *Stark* v. *Wickard*, 321 U. S. 288, 308). On the other hand, if respondents are correct in their contention that the cooperative payments are a discrimination among handlers, it is equally clear that respondents as farmers and producers have no standing in court to complain of discrimination between handlers.

Respectfully submitted,

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